BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CLARICE LARSON, Appellant, v. MASON COUNTY, Respondent.	SHB No 88-15 REVISED FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW AND ORDER AFTER REMAND

This is an appeal from conditions Mason County placed on a shoreline substantial development permit issued to Clarice Larson for the construction of a concrete bulkhead with fill below the ordinary high water mark of Hood Canal.

A hearing on the merits was held on May 5, 1989 in Lacey, Washington. Present for the Shoreline Hearings Board were Members: Wick Dufford, presiding, Harold S. Zimmerman, Nancy Burnett, Robert Schofield and Robert Hughes. Attorney Ralph Smith represented appellant Larson. Prosecuting Attorney Gary Burleson represented Mason County. Court Report Bibi Carter with Gene S. Barker & Associates, (Olympia) took the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Counsel made argument. From the testimony, exhibits and argument, on August 26, 1989, the Board issued Findings of Fact, Conclusions of Law and Order, and a Dissent. The Board affirmed the County's decision allowing a bulkhead five to seven feet out from the existing bank.

The matter was appealed to Superior Court in and for the County of Thurston. On October 30, 1990, the Hon. Judge Robert J. Doran ordered a remand to the Board for a new hearing consistent with the Court's Order.

After remand, a prehearing conference was held with the parties, from which a pre-hearing order issued. Briefs were filed. A transcript of the May 5, 1989 hearing was filed with the Board and distributed to the Board Members.

The Board held a hearing in Lacey, Washington on June 10, 1991. Present for the Board were Members: Judith A. Bendor, Chair and Presiding, Harold S. Zimmerman, Nancy Burnett, Robert Schofield, and Robert Hughes. Attorney Ralph Smith represented appellant Larson. Prosecuting Attorney Michael Clift represented Mason County. Court Reporter Bibi Carter with Gene S. Barker & Associates (Olympia) took the proceedings.

At the hearing, witnesses were sworn and testified. Additional exhibits were offered, admitted and examined. Counsel made argument.

Board Members have reviewed the record. From the foregoing, the Baord issues these:

REVISED FINDINGS OF FACT

I

The site of the proposed bulkhead and fill is in Mason County, on the north shore of Hood Canal, roughly across from Twanoh State Park.

The shorelines are of state-wide significance under the State of Washington Shoreline Management Act, Chapt. 90.58 RCW. The site is within the "urban residential" environment under the Mason County Shoreline Master Program (SMP).

II

Clarice Larson had applied to Mason County, on November 25, 1987, for a shoreline substantial development permit for a 9 foot high concrete bulkhead at the 9.4 foot tidal elevation, with 780 cubic yards of fill to be placed behind the bulkhead. This request subsequently was modified, and it is this modified proposal that is on appeal to the Board.

As modified. the structure would be closer to shore, at the 11.5 foot tidal elevation. The height would be 7 feet. Even with the change, the bulkhead would be 100 feet wide and protrude seaward 20 feet beyond the Ordinary High Water Mark (OHWM). There would be 450 cubic yards of fill.

III

On February 9, 1988, Mason County approved the bulkhead, but required that it be built closer to the bank. (The OHWM is at the bank.) The approval was conditioned as follows:

> *Bulkhead must be constructed within 5-7 feet of the bank, with the average distance being five feet. Any fill placed on the County road right-of-way will be subject to approval of the Mason County Department of Public Works.*

Clarice Larson filed an appeal with this Board, contesting the 5-7 foot dimension. This appeal became SHB No. 88-15.

IV

The property in question has been owned by appellant Larson for about 20 years, and has been owned by her family since 1945.

The Larson property is split in two by a County road. The upland portion of the property is steep. Over the years appellant, her family, and guests have parked two to three vehicles on the upland property, including a car and trailer.

V

The waterward portion of the property, between the road and Hood Canal, consists of two lots, 195 feet in total width. This part of the property is also undeveloped. There is a 7 to 10 foot high bank between the road and the beach, with 6 to 10 feet of dry land from the road to the edge of the bank. At least one car has been parked on this side of the road. The bank's slopes are partially covered with vegetation.

VI

A bulkhead and fill at the 11.5 foot tidal elevation would cover navigable waters, creating dry land. The structure would at least triple the dry land area that is now waterward of the road. The bulkhead and fill would cover natural beach.

VII

At the June 10, 1991 hearing, appellant Larson presented evidence that her family and guests have recreated on this property for decades, without there being a bulkhead. They have had picnics, camped, gone boating and swimming, and so forth. See photographs in Exhibit A-9. They park their cars on both sides of the road, and walk down to the beach over the western part of the bank. When recreating, they have to pay attention to the tides, as Ordinary High Water covers the beach up to the bank.

The proposed bulkhead and fill would be for private recreational use only.

VIII

Appellant wants the bulkhead so she and her family and guests can recreate on dry land irrespective of the tides, and to store things. Appellant does not want the bulkhead for erosion control. If built for that purpose, it would benefit the County road.

At the June 10, 1991 hearing appellant stated that eventually they would like to build on the property, depending on how much land is allowed.

We find that a bulkhead 5 to 7 feet from the existing bank does protect the road and the Larson property from erosion. There is no evidence that this distance is not a reasonable working distance for erosion control.

We find that the Larson shoreline permit application to the County did not apply for a bulkhead for a single family home. ~~They~~ She applied for a bulkhead for recreational use. The parties did not present evidence during the May 1991 hearing on what minimum size would be necessary to recreate on dry land at all tidal cycles, including high tide.

IX

Properties on either side of appellant's property are bulkheaded and have houses. The bulkhead to the west is at the 8.5 foot tidal elevation. The Larson bulkhead would be 50 feet, laterally, from this bulkhead. The bulkhead to the east is at the 11.5 foot tidal elevation. The Larson bulkhead would be 95 feet from this neighbor's bulkhead. There would, therefore, be some natural bank at each end of the proposed bulkhead.

Appellant did not present any evidence demonstrating that the neighbors' bulkheads were built under the Shoreline Management Act and/or the Mason County Shoreline Master Program. They did not present evidence that shoreline permits were sought and obtained.

X

Initially the Department of Fisheries limited its hydraulic project approval (HPA) to a bulkhead no more than 7 feet from the existing bankline in order to avoid covering surf smelt spawning substrate and littoral drift changes detrimental to surf smelt spawning.

In the fall of 1988, a consultant retained by Larson examined the site and concluded that a bulkhead at the 11.5 foot tidal elevation probably would not adversely affect surf spawning in the area. As a result, DOF reconsidered its HPA decision, and modified its permit to allow the bulkhead at that tidal elevation.

XI

In a natural shoreline, wind, waves and tides move sand and other beach material along the shoreline. This key natural process is known as littoral drift. See WAC 173-16-050 for a description of marine beach natural geographic processes.

The placing of a bulkhead on the beach below Ordinary High Water Mark interferes with this process, causing sand to build up on that site, preventing the sand from replenishing other beaches. The farther out into the water such structure is placed, the more this natural process is impacted. We find that this project would have some incremental impact on littoral drift, sand transport and beach replenishment.

XII

Evidence was presented at the second hearing about five other properties on Hood Canal that had been bulkheaded after receiving a Mason County shoreline permit. The record does not reveal whether these were substantial development, conditional use or variance permits. None of these permits were appealed to the Shoreline Hearings Board.

Robert E. Sproul received shoreline permit No. 87-16 for a bulkhead at N.E. 1041 No. Shore Rd. in Belfair. There is currently a house on-site. The bulkhead is located at the 11.6 tidal elevation.

Charles and Margaret Robson received shoreline permit No. 87-31 for a bulkhead at N.E. 12341 No. Shore Rd. in Belfair. The approved bulkhead is at tidal elevation 11, and is 65 feet wide, 6 feet high The Robsons have an adjoining house and property to the west.

George Davies received shoreline permit No. 87-27 for a bulkhead at N.E. 13321 No. Shore Rd. in Belfair. The bulkhead is approximately at tidal elevation 10. There is a house adjacent to the bulkhead.

Tom Paulson received shoreline permit No. 87-38 for a bulkhead at Lot 23 Sportsmen's Waterfront Tract. The bulkhead is at 11.5 tidal elevation, is 50 feet wide and 6 feet high. A building permit has also been approved.

John Steutker received shoreline permit No. 87-3 for a bulkhead at Sec. 11-22-2 W, Sunset Beach Tract, at tidal elevation 11.5. It is adjacent to his house.

XIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board makes these:

REVISED CONCLUSIONS OF LAW

I

The Board has jurisdiction over these issues and these parties.

Applicant appealed to this Board because Mason County granted a permit for less than she had requested. Appellant, therefore, has the burden to prove her proposal is consistent with the Shoreline Management Act (SMA; Chapter 90.58 RCW), the regulations, and the Mason County Shoreline Master Program (SMP). RCW 90.58.140(2)(b); RCW 90.58.140(7).

II

The Shoreline Management Act was enacted in significant measure as a result of the Supreme Court's decision in the Lake Chelan case, Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969). Crooks, The Washington Shoreline Management Act of 1971 (1974), 49 Wash.L.Rev. 423-425. See also, Settle, Washington Land Use and Environmental Law and Practice (1983), pp. 123-132.

> *The level of Lake Chelan is artificially fluctuated. Defendents owned land that was submerged when the lake level was high. They had filled that land to a grade permanently above the highest water level in order to use it as a trailer court. The Washington [Supreme] court ordered abatement of the fill, on the ground that it "obstructed the rights of plaintiffs and the public to swim, boat, fish, bathe, recreate and navigate in the waters of the lake." Crooks, supra, p. 425-6, citing Corker, Thou Shalt Not Fill Public Waters Without Public Permission--Washington's Lake Chelan Decision, 45 Wash.L.Rev. 65 (1970), at 65.*

The bulkhead and fill are to be sited on Hood Canal. The Legislature has specifically declared all of Hood Canal to be a a shoreline of state-wide significance. RCW 90.58.030(2)(e)(ii)(C).

III

In the context of this court decision, Inititiative Measure 43 was presented to the Legislature. The Legislature, in turn, passed the Shoreline Management Act (as Alternative Measure 43B). Both measures were presented to the voters, with the public choosing the SMA. Crooks, supra; Settle, supra.

The primary responsibility for administering the SMA's regulatory program is with local government, with support and oversight by the Department of Ecology. Crooks, supra, p. 429.

IV

In the Shoreline Management Act, the Legislature declares:

> *The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.*
>
> *It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy*

is designed to insure the development of the shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the state-wide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline.[...] RCW 90.58.020; emphasis added.

V

The Shoreline Management Act's policies for such shorelines are heavily weighted toward water dependent developments which preserve the natural character of the shoreline and protect the resources and ecology of the shoreline.

The Mason County Shoreline Master Program (MCSMP) essentially repeats the provisions of the statute in regard to such shorelines. MCSMP Sections 7.04.23; 7.24.010.

The Shoreline Management Act:

> *Alterations of the natural conditon of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to the shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state [...]*RCW 90.58.020; emphasis added.

Alterations of the natural shoreline, particularly on shorelines of state-wide significance, are disfavored, and are to be granted in limited situations, consistent with the Act's priorities.

VI

After the passage of the SMA, the Department of Ecology adopted regulations to guide local government in the adoption of Shoreline Managment Programs. Chapt. 173-16 WAC. The Guidelines state:

> *The construction of bulkheads should be permitted only where they provide protection to upland areas or facilities, not for the indirect purpose of creating land by filling behind the bulkhead.[...]* WAC 173-16-060(11)(e)

Bulkheads or landfills for the indirect purpose of creating land are inconsistent with the Shoreline Management Act's policies and with the Guidelines. Isaak and Baker v. Snohomish County and DOE, SHB No. 19 (1974); DOE v. Mason County and Frint, SHB No. 128

VII

The MCSMP was approved in August 1975. The MCSMP has adopted the Shoreline Management Act policies and preferences for shorelines of state-wide significance. MCSMP Sections 7.04.23; 7.24.010.

The MCSMP general regulations for landfills in all the shorelines, including the urban residential environment, give priority to landfills for water dependent uses. MCSMP Sec. 7.16.150.A.5.

The MCSMP regulations for bulkheads, states at 17.16.110(B)(11):

> *In all instances, bulkheads may be constructed to prevent erosion. In such cases, they may be built seaward of existing natural banks a reasonable working distance. A reasonable working distance shall not exceed 10 feet, measured horizontally, except where there is a gross irregularity of the existing natural bank, as determined by [county officials].*

We have found, Finding of Fact VIII, above, that a bulkhead 5 to 7 feet from the natural bank provides erosion protection.

VIII

The shoreline management program came to Hood Canal after a great deal of development had already occurred there, some of it inconsistent with the policies of shoreline protection and preservation the SMA seeks to promote. Even if there were inconsistent existing development, that ought not dictate permitting future inconsistent development. Even though the impacts in individual cases may be minor, the cumulative effect of such an approach would effectively negate

shoreline management altogether. See Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976).

IX

Appellant does not have a house on the property. Appellant applied for the bulkhead for recreation, not for a single family residence. Other than appellant's statement at the second hearing that they wish to build some time in the future, there was no evidence presented on building a single-family residence there. We conclude that both procedurally and evidentiarily, this proposal is to be analyzed as an erosion control or recreational project.

We conclude that the proposed bulkhead is not a normal protective bulkhead common to single familiy residence. WAC 173-14-040(c); MCSMP 17.16.110.B. If appellant wants to re-apply to the County for that type of bulkhead, she is not foreclosed from doing so.

X

Regarding the other Mason County shoreline permits for bulkheads, for four of them appellant has not been shown ~~there to be~~ a similar situation, as there are houses there. Only the permit for Paulson was issued and no house is present. Moreover, from the record we cannot determine what type of shoreline permits Mason County issued for any of these bulkheads.

The County permit decisions did not result in appeals to this Board and a decision on the merits after adjudication.

X

Appellant's proposed bulkhead and fill would extend 20 feet into navigable waters, 20 feet beyond the Ordinary High Water Mark. During Ordinary High Water the public has the right to use these waters.

At the present time, without a 20 foot bulkhead, appellant recreates extensively on the property except during high tide. At that tidal cycle, appellant can recreate on navigable waters like all the public. Appellant has the added benefit of being able to park on her property.

The proposed bulkhead and fill would be an alteration of the natural shoreline.

The proposal is not for a water-dependent use. See, League of Women Voters v. King County, SHB No. 13.

The proposed bulkhead and fill are soley for private use. No public interest is served. To the contrary, the public's right to use the navigable waters would be dimnished.

We conclude the proposed bulkhead and fill, 20 feet into the Ordinary High Water Mark, are inconsistent with the Shoreline Management Act policies and preferences, and are not a reasonable or appropriate use. RCW 90.58.020, and the Mason County Shoreline Master Program. In so concluding, we quote from a case early in the history of Shoreline Management Act litigation:

> *Here, respondent serves his own private interest. Although he does own the land, he does not own or control the public's interest in the waters of the state.* DOE v. Mason County and Frint, *SHB No. 128*

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this:

ORDER

Mason County's shoreline substantial development permit for Clarice Larson is AFFIRMED.

DONE this 4th day of September 1991.

JUDITH A. BENDOR, Presiding

(See Dissenting Opinion)
HAROLD S. ZIMMERMAN, Chairman

NANCY BURNETT, Member

(See Dissenting Opinion)
ROBERT C. SCHOFIELD, Member

BOB HUGHES, Member

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DISSENT - ZIMMERMAN/SCHOFIELD

A shoreline permit for a bulkhead 10 feet from the ordinary high water mark should be granted.

This dissent from the majority in this remanded case comes from these factors:

1. Recognition that this part of Hood Canal in Mason County where the Larsons have owned property for over 25 years is not pristine nor is it a fish-spawning sanctuary.

2. It is a limited strip of waterfront wedged in betweeen considerably larger more dominating properties on Hood Canal. Bulkheads and homes push much farther into the waters than had been recommended by the appellants.

3. The proposed bulkhead 10 feet from the ordinary high water mark will: (a) protect the public's county road from further potential damage (b) protect the erosion of additional land and trees on the lower property (c) provide a small, but safer parking, picnic and recreation area for owners and their family, and for others of the public who will undoubtedly use the property when the Larsons are not there.

4. The legislators and others who drafted the Shoreline Management Act of 1971 wisely recommended that shorelines are a resource to be used and to encourage development where it already has taken place. They did not encourage taking away the privileges of private ownership of such properties without compensation.

5. The 10-foot strip is hardly large enough for the building of a house and therefore shall not be large enough to seriously, severely damage this piece of shoreline or the environment.

6. Appellants are entitled to have their shoreline permit be considered under the policy at the time they first applied, not as the master program was later revised.

7. The Larsons hired fish experts to assure there would be no adverse impact on spawning fish in the proposed area.

8. There are no adverse impacts on the aesthetic views from the proposed bulkhead. It would be constructed to blend into the natural shoreline. It would have no view blockage.

9. A 10-foot distance does not provide a Wilbour-Gallagher type encroachment on the public waters of the state, but it does provide a practical solution to an over-litigated, lengthy, costly appeal.

HAROLD S. ZIMMERMAN, Member

ROBERT C. SCHOFIELD, Member

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